Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home *and* United Steelworkers of America District 12, Subdistrict 2, AFL–CIO–CLC. Cases 28–CA–016762, 28–CA–017278, and 28–CA–017390

August 25, 2014

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On June 30, 2004, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which the Board found, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the work hours of unit employees in its Respiratory Department from 40 hours per week to between 32 and 36 hours per week. To remedy that violation, the Board ordered the Respondent to "[m]ake employees whole for any loss of earnings and other benefits suffered as a result of the unilateral change[]," to be "computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970)[, enfd. 444 F.2d 502 (6th Cir. 1971)]."[2]

In the subsequent compliance proceeding,[3] the Board affirmed the judge's supplemental decision and held, inter alia, that the backpay due each employee should not be reduced by any interim earnings the employees may have generated during the backpay period. Further, in a Supplemental Order, the Board required the Respondent to pay the backpay awards plus the interest then due.[4] The Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Board's Supplemental Order, and the General Counsel cross-applied for enforcement. On December 20, 2011, the court issued a decision granting in part the cross-application for enforcement. However, the court also granted the petition for review in part, vacated the Board's backpay computation, and remanded the case "for a more thorough analysis of" the interim earnings issue.[5]

On May 25, 2012, the Board notified the parties that it had accepted the remand and invited them to file statements of position. The General Counsel and the Respondent filed statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The single issue on remand is whether the Board should deduct an employee's interim earnings from other employment when calculating backpay in cases where the employee suffers no cessation of employment with the wrongdoing respondent-employer and has no duty to mitigate damages by seeking interim employment. For the reasons explained below, we conclude that the deduction of interim earnings in this situation would not best effectuate statutory policy and we reaffirm our earlier holding not to do so.

I. BACKGROUND

During the hearing for the compliance proceeding, the Respondent submitted an offer of proof that two of the employees entitled to backpay under the Board's original Order had taken on additional work at other hospitals to offset the Respondent's unlawful reduction of their hours. As a result, at least these two employees had generated interim earnings, which, according to the Respondent, should have been deducted from their backpay awards. The judge rejected this argument, finding that under "the clear language [of] *Ogle Protection*," interim earnings are not considered "in cases of this type," i.e., those involving no job loss. *Mimbres Memorial Hospital & Nursing Home*, 356 NLRB No. 103, slip op. at 9. Specifically, the judge relied on language in *Ogle Protection Service* holding that the quarterly backpay computation method set forth in *F.W. Woolworth Co.*[6] would be "unnecessary and unwarranted" in cases not involving "cessation of employment or interim earnings that would in the course of time reduce backpay." Id. (quoting *Ogle Protection Service*, 183 NLRB at 683). Based on this language, the judge concluded that deducting interim earnings from backpay awards in cases like this one would "impos[e] a duty on employee[s] . . . to moonlight in order to minimize the impact of the unlawful conduct for the benefit of the wrongdoer." Id. slip op. at 9. On exceptions to the Board, the Respondent renewed its argument that the General Counsel was required to investigate and plead the employees' interim earnings and offset them against their backpay awards. The Board rejected this argument.

In its opinion remanding, the D.C. Circuit panel highlighted three concerns about the Board's reasoning. Ini-

[1] 342 NLRB 398 (2004), affd. 483 F.3d 683 (10th Cir. 2007).

[2] Id. at 404.

[3] *Mimbres Memorial Hospital & Nursing Home*, 356 NLRB No. 103 (2011), enfd. in part and remanded in part 665 F.3d 196 (D.C. Cir. 2011).

[4] Id. slip op. at 1.

[5] *Deming Hospital Corp. d/b/a Mimbres Memorial Hospital v. NLRB*, 665 F.3d 196, 198–201 (D.C. Cir. 2011).

[6] 90 NLRB 289, 291–293 (1950).

tially, the court observed that the "clear language" of *Ogle Protection Service* does not address the interim earnings issue presented in this case. *Mimbres Memorial Hospital v. NLRB*, 665 F.3d at 200. In particular, while *Ogle Protection Service* stands for the proposition that where an employer's unlawful action "does not involve . . . interim earnings," the Board should not calculate backpay on a quarterly basis, it does not stand for the converse proposition that "if the Board cannot calculate backpay on a quarterly basis, then it should not consider interim earnings" actually generated. Id. The court further observed that the *Ogle Protection Service* Board appeared to assume an employee who had not suffered a job loss would not seek another job, and therefore, would not generate interim earnings. Id.

Second, the court concluded that the Board's concern for imposing a "duty to moonlight" improperly "seems to conflate, and thus confuse, an employee's duty to mitigate with rules governing when backpay should be reduced by interim earnings." Id. at 200. The court found that while unlawfully discharged and laid-off employees have a duty to mitigate, and victims of unfair labor practices not resulting in job loss do not, the Board may nonetheless be obliged to consider interim earnings to prevent those employees who did engage in other work from receiving windfalls. Id. at 200–201. In that connection, the court explained that the Board could account for the interim earnings of continuously employed workers without imposing on them a duty to mitigate. Id. at 201. Specifically, it stated that "a non-terminated employee who seeks out interim earnings after an unlawful hours or wage reduction would have his [or her] backpay award reduced by those earnings, but would have the potential to earn more money overall. Meanwhile, a non-terminated employee who chooses not to seek interim earnings would receive his [or her] full backpay award (because he [or she] had no duty to find additional work), but would forego the potential to make even more money through additional employment." Id. According to the court, both of these potential outcomes are consistent with the Board's obligations "to ensure that its remedies are compensatory and not punitive, and to guard against windfall awards that bear no reasonable relation to the injury sustained." Id. (quoting *Oil Capitol Sheet Metal*, 349 NLRB 1348, 1353 (2007)).

Finally, the court found that "[t]he Board's concern about imposing a duty to mitigate is also belied by its willingness to account for interim earnings in other cases involving relatively small reductions in hours or wages," citing two Board cases which ordered make-whole relief, "less any net interim earnings." Id. at 201.[7] The court further rejected the Board's argument that its refusal to deduct interim earnings was consistent with established precedent, as set forth in *88 Transit Lines*, 314 NLRB 324, 325 (1994), enfd. 55 F.3d 823 (3d Cir. 1995). Although the Board refused to consider interim earnings in that case, because it "involv[ed] a violation other than [a] discharge from employment," the court relied on the fact that the Third Circuit enforced the Board's decision on narrow grounds and expressly "did 'not read the [Board's order] to mean that reduction for interim earnings is never appropriate in a nondischarge case.'" *Mimbres Memorial Hospital v. NLRB*, 665 F.3d at 201 (quoting *88 Transit Lines*, 55 F.3d at 827 fn. 2).

In conclusion, the court made clear that it was not requiring the Board to consider interim earnings in this case. Instead, having found the Board's previous explanation inadequate for the reasons stated above, the court remanded this case for a more thorough analysis of the interim earnings issue. Having accepted the remand, we apply the court's opinion as the law of the case and undertake the directed analysis.

II. ANALYSIS

Section 10(c) of the Act empowers the Board to order backpay as a remedy for unfair labor practices. "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). The Board's objective is to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The Board's authority to order "affirmative action"—including the payment of backpay—is remedial, not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

Since its first decision in 1935, the Board has consistently deducted interim earnings from backpay awards in unlawful cessation of employment cases. See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935); *Pusey, Maynes & Breish Co.*, 1 NLRB 482, 488 (1936); *National Motor Bearing Co.*, 5 NLRB 409, 441 (1938), enfd. in relevant part as modified 105 F.2d 652 (9th Cir. 1939).[8] In 1941, the Supreme Court, relying

[7] *Amerigas Propane, L.P.*, 1997 WL 33315927 (NLRB Feb. 12, 1997) (judge's opinion) (reduction in weekly hours from 40 to 32); *Atlantis Health Care Group (P.R.) Inc.*, 356 NLRB No. 26, slip op. at 1 (2010) (30 to 45 cent decrease in hourly wages).

[8] Deductions are limited to "net earnings" to accommodate the expenses of obtaining substitute employment which, but for the discrimination, would not have been necessary. See *Phelps Dodge Corp.*, 313

upon the historical duty of mitigation doctrine, mandated that employees should have their backpay awards reduced not only by actual interim earnings, but also by "losses...willfully incurred" by an "unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp.*, 313 U.S. at 197–200. As the Court has explained elsewhere, the mitigation doctrine is "rooted in an ancient principle of law" governing the limitation of damages in private litigation. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (footnote omitted). Importantly, however, the *Phelps Dodge* Court explained that, by imposing the mitigation requirement in the context of violations of the Act, "we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment."[9] *Phelps Dodge Corp.*, supra at 200.

The *Phelps Dodge* decision was a strong affirmation of the Board's broad remedial authority, and the public policy underlying it, rather than a limitation of that authority. Endorsing the authority of the Board to find unlawful and remedy the discriminatory denial of hiring, it observed that "[a]ttainment of a great national policy through expert administration in collaboration with limited judicial review *must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies*." *Phelps Dodge Corp.*, 313 U.S. at 188 (emphasis supplied). Rejecting the argument that the Board lacked authority to order reinstatement of discriminatorily discharged workers who had obtained regular and substantially equivalent employment elsewhere, the Court stated even more emphatically that "[t]o deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the 'policies of this Act' to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining'." Id. at 192–193 (citations omitted). The *Phelps Dodge* Court did not in any way alter the Board's administrative practice with respect to the deduction of net interim earnings during the backpay period. The Board did that itself in 1950, adopting a quarterly computation method in cases involving "reinstatement coupled with back pay," i.e., those cases involving unlawful cessation of employment. *F.W. Woolworth Co.*, 90 NLRB 289, 292–293 (1950). The modification of the traditional practice of deducting interim earnings from backpay in a single computation for the entire backpay period was deemed necessary to avoid the adverse impact of this practice on the companion remedy of reinstatement. As the Board explained:

> The cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act. We have noted in numerous cases that employees, after having been unemployed for a lengthy period following their discriminatory discharges, have succeeded in obtaining employment at higher wages than they would have earned in their original employments. This, under the Board's previous form of back-pay order, resulted in the progressive reduction or complete liquidation of back pay due.
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> The deleterious effect upon the companion remedy of reinstatement has been twofold. Some employers, on the one hand, have deliberately refrained from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability. Thus, a recalcitrant employer may continue to profit by excluding union adherents from his enterprise. Employees, on the other hand, faced with the prospect of steadily diminishing back pay, have frequently countered by waiving their right to reinstatement in order to toll the running of back pay and preserve the amount then owing.

Id. at 291–292.

In *NLRB v. Seven-Up Co. of Miami*, 344 U.S. 344, 346–347 (1953), the Supreme Court expressly approved the *Woolworth* quarterly formula as a legitimate exercise of the Board's "broad discretionary" remedial authority under Section 10(c). In doing so, it rejected the dissenting argument that "[b]y the quarterly calculation approved by the Court in the instant case, not only may a wrongfully discharged employee often receive as back pay a greater amount than he would have received had he worked at his regular job, but the employer must pay more than he would have had to pay if he had had the employee's services during the period. Thus, both of the avowed purposes of the rule which this Court has held must guide the Board in allowing back pay have been

U.S. at 198 fn. 7; *Crossett Lumber Co.*, 8 NLRB 440, 497–498 (1938), enfd. 102 F.2d 1003 (8th Cir. 1938).

[9] Since the Court's ruling in *Phelps Dodge*, the Board has held that "[a] discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate." *St. George Warehouse*, 351 NLRB 961, 963 (2007). In such situations, the Board "tolls backpay during any portion of the backpay period in which a discriminatee failed to mitigate." Id.

violated, namely, the employee is made more than whole, and the employer has accordingly been penalized." Id. at 355 (Justice Minton, dissenting). The Court majority effectively responded that it was sufficient that the Board had relied on its cumulative experience to "fashion one remedy [for backpay] that...complements, rather than conflicts with, another [for reinstatement]. It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is 'remedial' and what is 'punitive.' It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act." Id. at 348.

Nearly 20 years later, the Board held in *Ogle Protection Service* that in cases not involving a "cessation of employment status or interim earnings that would in the course of time reduce backpay, a quarterly computation is unnecessary and unwarranted." 183 NLRB at 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The holding of *Ogle Protection Service* reflected the Board's practical experience that in most cases involving unlawful adverse economic consequences, but no cessation of employment, affected employees will not even have the opportunity to generate any interim earnings. They would appear to have such opportunity only in circumstances of an unlawful reduction in work hours.

Thus, it is understandable that the Board generally does not mention, let alone consider, deducting interim earnings in cases applying *Ogle Protection Service*. See, e.g., *First Student, Inc.*, 359 NLRB No. 12, slip op. at 1 (2012) (unilateral changes/refusal to provide annual wage increases); *Art's Way Vessels, Inc.*, 355 NLRB 1142, 1150 (2010) (repudiation of contract and unilateral changes); *DHL Express, Inc.*, 355 NLRB 680, 680 fn. 5 (2010) (unlawful reduction in hours). When interim earnings are mentioned in reference to an *Ogle Protection Service* remedy, it is most often by quoting directly the language of that case explaining that the remedy applies where there is "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." E.g., *Pratt Industries*, 358 NLRB No. 52, slip op. at 1 fn. 2 (2012); *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).[10]

We acknowledge, however, that Board decisional language has, without explanation, occasionally provided for the deduction of interim earnings in cases where, as here, there has been no cessation of employment. In some cases, it has provided for the deduction of interim earnings while nominally applying *Ogle Protection Service*. See, e.g., *Williamette Industries*, 341 NLRB 560, 564–565 (2004) (lost income from discriminatory changes to work schedules); *Quality House of Graphics*, 336 NLRB 497, 516–517 (2001) (unilateral changes); *Consumers Asphalt Co.*, 295 NLRB 749, 752 (1989) (unlawful denial of contractual wage increase); *Ford Bros.*, 284 NLRB 211, 211–212 (1987) (repudiation of contract and refusal to apply contractual wage rates). In other cases involving no cessation of employment, the Board has applied *F.W. Woolworth* (instead of *Ogle Protection Service*) and provided for the deduction of interim earnings. See, e.g., *Atlantis Health Care Group (P.R.) Inc.*, 356 NLRB No. 26, slip op. at 1 (2010) (unlawful decrease in hourly wages); *Ironton Publications*, 313 NLRB 1208, 1208 fn. 4 (1994) (various unilateral changes, including unlawful reduction in hours).[11]

The aforementioned cases represent a tiny fraction of the hundreds in which *Ogle Protection Service* has been correctly cited and applied. In our view, the unexplained references in those few cases to the deduction of interim earnings and/or the *Woolworth* formula were inadvertently mistaken, rather than intentional. Further, notwithstanding the inaccurate statements for calculating backpay, we are unaware of any instance in these cases not involving the cessation of employment where deductions for interim earnings from outside jobs were actually taken.[12]

Contrary to any misperceptions created by these few inconsistent cases, Board policy has been to preclude the

[10] The Respondent's reliance on *Pratt Industries* and *Pepsi America* for the proposition that the Board generally deducts interim earnings in *Ogle Protection Service* cases involving a reduction in hours is clearly misplaced. In fact, the Board in those cases merely substituted *Ogle Protection Service* for the judge's erroneous citation of *F.W. Woolworth*. Neither the Board nor the judge discussed any particular interim earnings in either case. See *Pratt Industries*, supra at 1 fn. 2; *Pepsi America*, supra at 986 fn. 2.

[11] In one other case, a judge—not the Board—ordered the deduction of interim earnings absent any employment cessation without specifically relying on either *Ogle Protection Service* or *F.W. Woolworth*. See *Amerigas Propane, L.P.*, 1997 WL 33315927 (NLRB Feb. 12, 1997) (judge's opinion) (unlawful reduction in hours). The D.C. Circuit cited the judge's decision in *Amerigas Propane* as one of two examples of Board precedent nominally supporting the deduction of interim earnings. That decision, however, was not reviewed by the Board and has no binding precedential value.

[12] The actual deduction of interim earnings took place only in *Ford Bros.*, supra, where it is apparent that the interim earnings deducted were the *reduced wages earned working for the wrongdoing employer* during the backpay period, which were offset against the gross amounts they should have earned but for unlawful conduct. That situation is entirely different from, and provides no support for, deducting additional amounts earned working for another employer while continuing to work unlawfully reduced hours for the wrongdoing employer.

deduction of interim earnings from other jobs when applying *Ogle Protection Service* to remedy employees' monetary losses where there is no cessation of employment and attendant duty to mitigate damages. We are mindful of the court's view that the literal language of *Ogle Protection Service* does not compel the conclusion that interim earnings, where proven, should not be deducted in cases where there is no job loss. *Mimbres Memorial Hospital v. NLRB*, 665 F.3d at 200. We are mindful as well that the court made clear that it was not requiring the Board to deduct interim earnings, only that we provide a more thorough explanation for not doing so.

This is a policy matter involving our undisputedly broad discretionary authority to fashion remedies under Section 10(c) of the Act. See, e.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). In particular, "[w]hen the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 346–347 (internal quotations omitted). Our determination that interim earnings should not be deducted in applying the *Ogle Protection Service* backpay formula falls well within the permissible bounds of the Board's broad remedial discretion, and effectuates important statutory policies expressly recognized by the Supreme Court.

We are guided by the Supreme Court's "healthy policy of promoting production and employment." As discussed above, it was this public policy, rather than an equitable concern for minimization of private damages, that motivated the imposition of a duty to mitigate in *Phelps Dodge*. It is undisputed here that no duty to mitigate exists in unfair labor practice cases of unlawful economic loss that do not involve the cessation of employment. We readily accept the D.C. Circuit's view that we *could* deduct interim earnings without imposing a duty to mitigate in such a case, but we conclude that doing so would contravene the policy of promoting production and employment. Indeed, by declining to deduct interim earnings absent a cessation of employment, we offer employees a greater incentive to voluntarily seek interim employment, thereby affirmatively "promoting production and employment." Even when interim work is obtained in an unlawful loss of employment situation subject to the duty to mitigate, it is well established that "only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay"—a rule "applicable in any situation." NLRB Casehandling Manual (Part Three) Compliance Secs. 10554.3–10554.4 (2011). "A backpay claimant who 'chooses to do the extra work and earn the added income made available on the interim job' may not be penalized by having those extra earnings deducted from the gross backpay owed by the [r]espondent." *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989) (citing *United Aircraft Corp.*, 204 NLRB 1068, 1073 (1973)); see also *Center Service System Division*, 355 NLRB 1218, 1221 (2010) (overtime hours of employees discharged or denied hire exceeding those worked by the respondent's other employees not deductible because where "a diligent backpay claimant chooses to work additional overtime during interim employment, it should operate to his [or her] advantage, not that of the employer required to make him [or her] whole for a discriminatory discharge").

We find the reasoning of these cases applies with equal force where a diligent backpay claimant under no obligation to work additional interim hours on another job chooses to do so. This is particularly so because the employee whose hours or wages have been unlawfully reduced continues to work for the wrongdoing employer and must adjust any outside employment hours to accommodate that employer's demands. For example, as a means of recouping earnings lost by an employer's unlawful conduct, employees must overcome the additional hardships involved in taking a second job such as resolving scheduling conflicts between the two jobs and traveling to a second workplace. In fashioning make-whole relief, we acknowledge these practical considerations and encourage employees to address their financial situations contemporaneously.

In our view, permitting the employer to deduct those interim earnings from backpay owed, rather than permitting the employee to enjoy the full benefit of them, would represent an unwarranted windfall to the employer and discourage compliance with the law. Indeed, in *United Aircraft Corp.*, supra at 1073, the Board observed that to the extent the employee is arguably made "more than 'whole,' it is a result of his [or her] extra effort above and beyond his [or her] performance of a full-time job, not because the [r]espondent is required to do more than make him [or her] whole for the loss of earnings suffered as a result of [the] unlawful termination." Similarly, because the continuously employed workers had no duty to mitigate by working hours unlawfully taken from them, their interim earnings both up to and exceeding those typically available from the Respondent were procured through their own "extra effort," and do not result from *the Respondent* making employees more than whole.

Our conclusion would be the same even if the retention of income from hours worked with another employer were deemed a windfall to the wronged employee. The Board is not concerned with employee windfalls in a vacuum, but only with those "bear[ing] no reasonable relation to the injury sustained." See *Oil Capitol Sheet Metal*, 349 NLRB at 1353. As the Supreme Court opinions in both *Phelps Dodge* and *Seven-Up* make vividly clear, our consideration of "the injury sustained" is focused on the effectuation of public policy expressed in the Act rather than the mere redress of private injury. As in *Seven-Up*, even if an employee's retention of certain interim earnings in addition to backpay makes that employee more than whole, this is a permissible remedial outcome if it bears "an appropriate relation to the policies of the Act." 344 U.S. at 348.

In further parallel to *Seven-Up*, and the *F.W. Woolworth* formula approved there by the Court, we find that a policy of precluding deduction of interim earnings in applying the *Ogle Protection Service* backpay formula bears an important complementary relation to the companion remedial requirement that the Respondent rescind its unlawful reduction of hours and restore to affected employees the hours they previously worked. Permitting the deduction of interim earnings on another job would have the same twofold deleterious effect on the rescission remedy as motivated the Board to change its single-computation backpay formula because of the effect on the companion reinstatement remedy. Wrongdoing employers knowing that the longer an employee worked a second job, the greater could be the reduction in backpay owed, would be unjustly rewarded for delaying compliance with a Board rescission order.[13] In such circumstances, outside employment forced on an employee because of an unlawful reduction in hours, would serve to subsidize the violation and allow the employer to reap the benefit of its unlawful conduct in the form of a reduction—perhaps to zero—of its backpay obligation. On the other hand, employees suffering from both the financial strains of continued reduced hours as well as the practical difficulties of working a second job to offset economic losses, could well be motivated to seek full-time employment elsewhere, abandoning their entitlement to full vindication of their statutory rights vis-à-vis the wrongdoing employer.

In sum, we hold that important statutory policies strongly support a practice of declining to deduct interim earnings when applying the *Ogle Protection Service* backpay formula for cases involving economic loss but no cessation of employment. Accordingly, we reaffirm our prior backpay order in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home, Deming, New Mexico, its officers, agents, successors, and assigns, shall pay the amounts set forth in the Board's February 28, 2011 Supplemental Order,[14] plus interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Dated, Washington, D.C. August 25, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] We note that, at least until the D.C. Circuit's opinion in this case, the Respondent was still contesting its obligation to rescind the unlawful reduction of hours worked by Respiratory Department employees. *Mimbres Memorial Hospital v. NLRB*, 665 F.3d at 202–203. This was approximately 7 years after the reduction took place.

[14] *Mimbres Memorial Hospital & Nursing Home*, 356 NLRB No. 103, slip op. at 1 (2011).